No. 11,413

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PHILIP B. FLEMING, Temporary Controls Administrator,

Appellant,

vs.

ELVIRA SEBASTIANI, AUGUST SEBASTIANI and BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Executors of the last will of Samuel Sebastiani, deceased,

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

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APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Francis A. Garrecht, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Pursuant to Rule 25 of the Rules of this Court, the Temporary Controls Administrator respectfully petitions for a rehearing of the above entitled appeal, which was dismissed on April 17, 1947.

In dismissing the appeal, this Court held that no valid substitution for a deceased defendant could be

made more than two years after his death, basing its decision on the Supreme Court case of *Anderson v. Yungkau,* ..... U.S. ....., 67 S. Ct. 428 (Jan. 13, 1947). It is submitted, however, that the problem raised by the instant case was not before the Supreme Court in *Anderson v. Yungkau.* There, the plaintiff did not move for substitution until more than two years after the death; in the instant litigation, the motion was made within the two-year period, but not acted upon by the District Court until after that period had expired.

In the *Yungkau* case, it was held that even "excusable neglect" constituted no exception to the two-year limitation in Rule 25(a)(1) of the Federal Rules of Civil Procedure, and would not excuse the plaintiff's failure to move to substitute until after expiration of the two years. The decision was based on the fact that the policy behind Rule 25(a)(1) is the furtherance of prompt and orderly probate administration in the State Courts, and that the possibility of belated attempts to reopen or keep open such proceedings, in order to satisfy a claim against an estate to be adjudicated in the Federal Courts, would have a disruptive effect, *Anderson v. Yungkau, supra,* pages 430-431. And as between requiring plaintiffs to move to substitute within a specified period, and allowing such motions to be interposed for an indefinite time into the future where some excuse exists, it is clear that this policy demands that plaintiffs, at their peril, make timely motions to substitute.

But if a plaintiff makes such a motion within the specified time, and his rights can nevertheless be defeated by any of the numerous factors which might prevent the granting of substitution within the two-year period, the effect will be to defeat the very policy behind the Rule. Under the decision of this Court in the instant case, it will be to the interest of the estate to delay matters to the greatest extent possible, in the hope that by such dilatory tactics the cause of action against the estate can be effectively defeated. Efforts will undoubtedly be made in a large number of cases to hold up the appointment of the administrator or qualification of the executor as long as possible so that no party exists who may be substituted. Even after such an appointment, further dilatory tactics may be expected, in order, if at all possible, to avoid a determination within two years. Even if such efforts are unsuccessful, the attempt alone will result in at least some delay in the adjudication of the claim, and a corresponding interference with the final distribution and settlement of the estate. The "prompt and orderly probate administration" deemed by the Supreme Court to be fostered by Rule 25(a)(1), 67 S.Ct., at page 431, would thus be hampered rather than helped by the decision of this Court in the instant case.

Even where no dilatory tactics are encountered, other unfortunate consequences of this decision may be envisaged. A motion to substitute may be promptly made after the defendant's death, and the District

Court may erroneously deem the action one which abated at death and therefore deny the motion. Even if this decision be reversed on appeal, so much time may be consumed by the appellate proceedings (especially if *certiorari* is petitioned for) that the two-year period will have elapsed by the time the cause is finally remanded to the District Court, and the decision of reversal will have become a nullity. Legitimate claims will be at the mercy of fortuitous circumstances. What may well ensue as a result is a flood of attempts by understandably anxious plaintiffs to have the Circuit Courts of Appeals mandamus the District Judges to allow the substitution—a procedure disruptive of the normal appellate practice.

It may further be noted that the Supreme Court, in the *Yungkau* decision, refers to Rule 25(a)(1) as a statute of limitations, 67 S. Ct. 428 at page 431. Statutes of limitations restrict the time within which legal relief can be *requested* of a court; they do not limit the period within which the court may adjudicate the claim. This characterization of the Rule indicates that the Supreme Court's attention was directed solely to the factual situation of the *Yungkau* case—namely, the plaintiff's failure to make a timely motion—rather than to the situation presented in the instant litigation, in which the plaintiff acted within the specified time. It also offers reason for the belief that the Supreme Court regarded the Rule as merely limiting the time of *application for* substitution. Thus, while the words of Rule 25(a)(1) appear at

first blush to limit the time within which the Court may act, the Rule must be construed with regard to its underlying purpose;[1] this purpose, as shown above, is the prompt and orderly, rather than dilatory and chaotic, administration of estates. To achieve this end, and to avoid the confusion which would inevitably ensue from any other decision, it is submitted that an application by the plaintiff for substitution, made within two years, should be deemed as meeting the requirement of the Rule.

Further support for our construction of the Rule may be found in the proceedings of the Advisory Committee. That Committee last year proposed an amendment to Rule 25[2] which would have eliminated

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[1]Effectuation of the policy of legislation may govern its construction, even in the face of apparently unambiguous words. Cf., *United States v. American Trucking Associations,* 310 U. S. 534, 543-44, 60 S. Ct. 1059, 1063-64; *United States v. N. E. Rosenblum Truck Lines,* 315 U. S. 50, 55-56, 62 S. Ct. 445, 449; *Pembroke Realty & Securities Corp. v. Commissioner,* 2 Cir., 122 F.2d 252, 255.

Compare the construction of language very similar to that in Rule 25(a)(1), in Ore. L. 1862, Sec. 37, Ore. Code (1930), Sec. 1-311, by the Supreme Court of Oregon, in *Dick v. Kendall,* 6 Ore. 166. Cf., *Hudson v. Williams,* 5 Ga.App. 245, 62 S.E. 1011; *Stepanian v. Moskovitz,* 232 Mich. 630, 206 N.W. 359.

[2]"If a party dies and the claim is not thereby extinguished, the court *upon application made* within 2 years after the death *shall* order substitution of the proper parties. *If the application is made after 2 years the court may order substitution but only upon the showing of a reasonable excuse for failure to apply within that period.* If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district."

(Proposed amendatory language italicized; 5 F.R.D. 452-453.)

both the issue in the *Yungkau* case, *supra,* and that in the instant case. The former would be covered by an express exception in the case of reasonable excuse; the latter, by making the two-year limitation unambiguously pertinent only to the time of application. The Committee's practice has been to explain every proposed amendment which it regards as changing the pre-existing Rule, in the Notes which it submits along with the proposed amendments. The Note to the proposed amendment to Rule 25[3] treats the reasons for the change covering the *Yungkau* issue, but makes no reference to the change which makes express the application of the two-year limit to the time of the motion for substitution. The inference is clear that this change of language was regarded as only declaratory in nature. The proposed amendment to Rule 25 was not passed on to Congress by the Supreme Court, presumably because the *Yungkau* case was then pending.

So far as we can discover, the instant case is one of first impression. In *Anderson v. Yungkau,* 67 S.Ct. 428, 429, the Supreme Court granted *certiorari,* al-

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[3] "This amendment guards against possible injustice in a case where there is some reasonable excuse for not applying for substitution within the 2-year period. It has been held that the court has no power to permit substitution after the expiration of the 2-year limit, irrespective of the circumstances. Winkelman v. General Motors Corp., S.D.N.Y. 1939, 30 F.Supp. 112; Anderson v. Brady, E.D.Ky. 1941, 1 F.R.D. 589, 4 Fed. Rules Serv. 25a.1, Case 1; Photometric Products Corp. v. Radtke, S.D.N.Y. 1946, 9 Fed. Rules Serv. 25a.3, Case 1; Anderson v. Yungkau, C.C.A. 6th, 1946, 153 F.2d 685, cert. granted, 1946, 66 S.Ct. 1025."

(5 F.R.D. 453.)

though there was no conflict among the Circuit Courts of Appeals, "because the case presented an important problem in the construction of the Federal Rules of Civil Procedure." The problem raised by the present litigation is of at least as great importance as that in the *Yungkau* case. Nor is this question one of "OPA law", it is a matter of concern in every type of litigation in the Federal Courts. Yet the issue has never been fully briefed and argued. The case was decided by the District Court and briefed by both parties in this Court without reference to this issue, which was first raised, apparently as an afterthought, in the appellees' oral argument.

For the foregoing reasons, it is respectfully urged that a rehearing be granted.

Dated, San Francisco, California,
May 16, 1947.

Respectfully submitted,

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Certificate of Counsel.

It is hereby certified that the foregoing petition is in my judgment well founded and not interposed for delay.

Dated, San Francisco, California,
May 16, 1947.

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